FILED
NOV 7 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 416

STATE OF TEXAS,

Petitioner

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PRICE DANIEL
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General
Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States and the Honorable Chief Justice and Associate Justices of Said Court:

The Petitioner, the State of Texas, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an appeal by the State of Texas from Order No. 3571 of the United States District Court for the Eastern District of Missouri, entered October 3, 1950, in Cause No. 6935, In the Matter of Missouri Pacific

Railroad Company, Debtor, approving that part of the Plan of Reorganization of the principal debtor which provides that the properties of the International-Great Northern Railroad Company and 13 other subsidiary railroad company debtors, all chartered under the laws of the State of Texas, shall be merged or consolidated by transfer of the assets and properties of all such companies to a new or reorganized company, not incorporated under the laws of the State of Texas, which transfer may be effected by a merger, consolidation, transfer of assets, and/or any other means approved by the Reorganization Managers. (DR 28692-28693.)[1]

This proceeding was originally instituted by the principal debtor on March 31, 1933. Thereafter, the 14 Texas subsidiary railroad company debtors filed similar petitions therein. The system Plan of Reorganization, as approved, was submitted by the Interstate Commerce Commission on August 2, 1949 in its 4th Supplemental Report, and, after further hearing, in its 5th Supplemental Report and order of December 29, 1949. (DR 28459-28760.) The plan contemplates the reorganization of these companies as a single new system company with a provision for the separate reorganization of the International-Great Northern Railroad Company if that should be necessary. The opinion of the District Court upon the ap-

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[1]Abbreviations referring to Record are: DR refers to that part of Vol. 52 of the District Court Record, Cause No. 6935, containing the 4th and 5th Supplemental Reports and 5th Supplemental Order of the Interstate Commerce Commission in Finance Docket No. 9918; TR refers to the printed record in Appeal No. 14,256 in the Court of Appeals; R refers to the printed record in Appeals Nos. 14,264-14,274 in the Court of Appeals; and CR refers to the record of proceedings in the Court of Appeals.

proved plan, which is reported in 93 F. Supp. 832, referred to the Court's previous opinions concerning earlier plans of reorganization of the same railroads reported in 39 F. Supp. 436, in 50 F. Supp. 936, and in 64 F. Supp. 64, which opinions set forth the relations of the Missouri Pacific Railroad Company to its subsidiaries, the course of the reorganization proceedings, and the questions, contentions, and rulings.

In approving the first plan of reorganization which was submitted to the District Court in 1940, and basing its findings in part on its previous findings in *Missouri Pacific Railroad Company Unification*, 166 I.C.C. 154 (1930) and 175 I.C.C. 26 (1931), the Interstate Commerce Commission held that there should be an entire merger and consolidation of all system properties, including the International-Great Northern Railroad Company and the 13 other Texas subsidiary railroad companies. (*Missouri Pacific Railroad Co. Reorganization*, 239 I.C.C. 7, 82-87.)

In approving the plan on June 20, 1941, the District Court found that the plan was defective insofar as it required consolidation and merger of the properties of *all* of the Texas debtor companies in the absence of some modification of the decree in the suit styled *I. & G. N. Railway Company v. Anderson County, et al.*, (Tex. Civ. App. 1914), 174 S.W. 325, affirmed 206 U.S. 424. (39 F. Supp. 436, 448, 449.) The plan, as modified and approved by the Court, was appealed to the Court of Appeals for the Eighth Circuit and by it remanded on May 8, 1943 to the District Court and by the District Court referred back to the Interstate Commerce Commission for further proceedings. (50 F. Supp. 936, 937, 943.)

After receiving the plan of reorganization back from the Court, the Interstate Commerce Commission held hearings and in its order of October 9, 1944 (*Missouri Pacific Railroad Co. Reorganization*, 257 I.C.C. 479 and 257 I.C.C. 745) ultimately approved, with certain alterations, a plan known as the "compromise" plan, which was still substantially the plan as to consolidation or merger of the subsidiary debtors previously approved by the District Court in 1941.

After having been approved by the District Court, (*In re Missouri Pacific Railroad*, 64 F. Supp. 64, 68), the "compromise" plan was returned to the Interstate Commerce Commission because the Commission filed with the Circuit Court of Appeals a memorandum indicating that the proposed plan had become obsolete because of substantial debt retirements and large accumulations of cash which had resulted from war earnings. (TR 88.)

On October 28, 1948, the Interstate Commerce Commission issued the 4th Supplemental Report in Finance Docket No. 9918, proposed by Ralph H. Jewell, Examiner, which recommended that the protest of the State of Texas be rejected except as to its objection to the consolidation of the properties of the International-Great Northern Railroad Company with the reorganized company, the recommendation being that in this respect there be no modification of the provisions of the previous plan. (TR 8-11.) On December 6, 1948, the State of Texas filed its exceptions to the proposed report, specifically excepting to the dissolution and merger or consolidation of the subsidiary railroad company debtors forming part of the Missouri Pacific System which were incorporated under the laws of the State of Texas and operating in Texas in intrastate

commerce, contending (1) that under the Constitution and laws of the State of Texas no foreign railroad carrier can receive a permit from the State to operate within the State in intrastate commerce; (2) that the legal principles in *Seaboard Airline Railway Receivership* (261 I.C.C., 689, 718) are not applicable in that the provisions of the Constitution and laws of South Carolina are not the same as the provisions of the Constitution and laws of Texas; (3) that the decision in the South Carolina case is not controlling in the present proceedings because such proceedings were under Section 5 of the Interstate Commerce Act, as amended, and not under Section 77 of the Bankruptcy Act; (4) that the proposed consolidation or merger is an attempt to set aside or overrule the principles of law enunciated by the United States Supreme Court in *Railway Express Company v. Virginia*, 282 U.S. 440; and (5) that the proposed merger constitutes a violation of the Fifth and Tenth Amendments to the Constitution of the United States insofar as it attempts to authorize the use of the public highways of the State of Texas by the reorganized company as a foreign corporation or to grant to the reorganized company the title to and the right to use the rights-of-way acquired by condemnation proceedings by each of the 14 Texas subsidiary railroad debtors under the laws of the State of Texas. (TR 11-15.)

On August 2, 1949, the Interstate Commerce Commission issued its 4th Supplemental Report and Order in Finance Docket No. 9918, in which it specifically overruled the contentions of the State of Texas, Nos. 1 to 4, inclusive, *supra;* did not discuss or specifically rule upon contention No. 5, *supra*, and reaffirmed without modification the finding concerning separate in-

corporation of the International-Great Northern Railroad Company contained in its previous plan. (DR 28613-28618.) Commissioner Splawn filed a separate opinion concurring in part with the majority opinion but dissenting vigorously as to the findings of the majority on the contentions of the State of Texas. (DR 28630-28633.)

On December 29, 1949, the Interstate Commerce Commission entered its 5th Supplemental Report and Order in Finance Docket No. 9918, and again overruled the contentions of the State of Texas (DR 28647-28653), Commissioner Splawn dissenting (DR 28685).

On March 27, 1950, the District Court proceeded to hear oral argument on the objections of the State of Texas (TR 65-85), and on July 29, 1950, rendered its opinion overruling each and every objection of the State of Texas (TR 111, 116).

On August 14, 1950, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the trial court. (CR 14-36.)

II.

STATEMENT AS TO JURISDICTION

(1) The date of the judgment of the Court of Appeals, Eighth Circuit, sought to be reviewed is August 14, 1948 (CR 14), and the opinion of the Court (CR 14-36) is reported in 191 F. 2d 265.

(2) The Court of Appeals has decided an important question of general law in conflict with the decision of this Court in *Calloway v. Benton*, 336 U.S. 132, in the construction of the provisions of Section 77 of the Bankruptcy Act (11 U.S.C.A., Sec. 205), and Section

5 of the Interstate Commerce Act (49 U.S.C.A., Sec. 5) relating to the granting of Federal powers to a reorganized railroad corporation operating in interstate commerce.

(3) The jurisdiction of this Court is invoked under the provisions of Section 24(c) of the Bankruptcy Act (11 U.S.C.A., Sec. 47(c)) and Section 1254(1) of the Judicial Code, Acts of June 25, 1948 (28 U.S.C.A., Sec. 1254(1)).

III.

QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

(1) The Court of Appeals decided that in proceedings under Section 77 of the Bankruptcy Act the Interstate Commerce Commission could grant the right to exercise the power of eminent domain to a reorganized foreign railroad corporation engaged in interstate commerce in a State where the exercise of such power by a foreign railroad company was prohibited by its Constitution and laws. This holding by the Court of Appeals is contrary to the express provisions of Section 77 of the Bankruptcy Act (11 U.S.C.A., Sec. 205), and is an important question of Federal law which has not been but should be decided by this Court.

(2) The Court of Appeals decided that the transfer to the reorganized foreign railroad company of the title to and the use of the easements for rights-of-way over public lands and highways belonging to and the property of the State of Texas, acquired by the Texas railroad company subsidiary debtors under the Constitution and laws of Texas, would constitute a valid and legal transfer of such title under the provisions

of the Plan of Reorganization. This holding by the Court of Appeals is directly contrary to and in violation of the Treaty of Annexation of the State of Texas with the United States and therefore violates Article VI of, as well as the Fifth and Tenth Amendments to, the Constitution of the United States in that it attempts to deprive a sovereign State of the title to its public lands, reserved to it by treaty, without due process of law. This is an important question of Federal law which has not been and should be decided by this Court.

IV.

THE QUESTIONS PRESENTED

The following questions are presented for decision:

(1) Whether Section 77(f) of the Bankrutpcy Act delegates to the Interstate Commerce Commission or the District Court, in railroad reorganization proceedings, the power to vest in a foreign railroad corporation the right of eminent domain over lands, public or private, situated in a State where, under the Constitution and laws thereof, such foreign railroad corporation is prohibited from exercising the right of eminent domain;

(2) Whether a plan of reorganization under Section 77(b)(5) of the Bankruptcy Act which authorizes transfer of the title to easements for rights-of-way over public lands held by subsidiary railroad company debtors, which revert to the sovereignty upon the breach of a condition subsequent, can convey the legal title to and the right to use such rights-of-way to a reorganized foreign railroad company which is prohibited by the Constitution and laws of a State from

obtaining a permit to engage in intrastate business therein.

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) In holding that the orders of the Interstate Commerce Commission which have been approved by the Court simply constitute an exercise of Federal power conferred upon the Commission by Federal statute, the Court of Appeals has decided a question of Federal law in a way that is untenable and is in direct conflict with the decision of this Court in *Calloway v. Benton*, 336 U.S. 132, in the construction of the provisions of Section 77 of the Bankruptcy Act (11 U.S.C.A., Sec. 205), and Section 5 of the Interstate Commerce Act (49 U.S.C.A., Sec. 5), relating to the granting of Federal powers to a reorganized railroad corporation operating in interstate commerce. This holding by the Court of Appeals is also in direct conflict with the decision of this Court in *California v. Central Pacific Railroad Company*, 127 U.S. 1, and other decisions of the Supreme Court of the United States.

In *Calloway v. Benton*, 336 U.S. 132, 140 (1949), this Court held, in part:

> "The Commission preferred, instead, to carry out the consolidation under the authority of §77 (b)(5) of the Bankruptcy Act, which provides that the plan of reorganization may include 'the merger or consolidation of the debtor with another corporation, or corporations.' *That power flows from a different source than the power over consolidations under the Interstate Commerce Act. . . .*"[2]

[2]Italics throughout are supplied unless otherwise indicated.

Inasmuch as the proceedings herein are under Section 77 of the Bankruptcy Act (TR 86), the powers of the Interstate Commerce Commission and the District Court to order mergers or consolidations are derived solely from that part of Section 8, Article 1 of the Constitution of the United States which gives the Congress power to establish uniform laws on the subject of bankruptcy throughout the United States, and *not* the provision giving Congress the power to regulate commerce among the several States.

In *Seaboard Airline Co. v. Daniel*, 333 U.S. 118, 126 (1947), this Court held that the power of eminent domain is granted to the new company as a federally conferred power under Section 5(11) of the Interstate Commerce Act, stating:

> ". . . These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California v. Central Pacific R. Co.*, 127 U.S. 1, 38, 40-45. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in this State."

In *California v. Central Pacific R. Co.*, 127 U.S. 1, 40 (1887), this Court held that under the power to regulate commerce among the several States the Congress could delegate the power to exercise the right of eminent domain to a private corporation, adding that *"the right of eminent domain can only be exercised by virtue of a legislative grant."*

The Court of Appeals decided that the Federal power conferred upon the Interstate Commerce Commission and the District Court under Section 77(b)(5)

and (f) was sufficiently broad to vest the power of eminent domain in a foreign railroad corporation which cannot exercise such power in the State of Texas, since it is prohibited by the Constitution and laws thereof from obtaining a permit to engage in intrastate business therein.[3] The Court of Appeals seems to have relied upon the ruling by this Court in *Seaboard Airline Co. v. Daniel, supra,* which involved a grant of such power under Section 5(11) of the Interstate Commerce Act, as authority to delegate federally controlled powers to the reorganized railroad corporation under Section 77 of the Bankruptcy Act (CR 22-25).

In the absence of congressional legislation delegating such federally controlled power to the new company under the plan of reorganization authorized by the Bankruptcy Act with the approval of the Interstate Commerce Commission and the District Court, it is clear that the power of the District Court under the provisions of Section 77(f) of the Bankruptcy Act does not have such extra-judicial or extra-territorial scope as to authorize the new company to exercise the power of eminent domain in Texas where the State of Texas has granted no such right or authority.

(2) In holding that the plan of reorganization provides adequate means for its execution by authorizing the transfer of the title to easements for rights-of-way over public lands held by the Texas subsidiary railroad company debtors, the Court of Appeals has decided a question of both Federal and State law in a way that is untenable and is contrary to and in violation of the Treaty of Annexation of the State of Texas,

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[3]Articles 1529, 1538, Vernon's Texas Statutes (1948 Edition). (App. 31.)

with the United States (2 Gammel's Laws of Texas, 1200, 1225, 1228), whereby Texas reserved all of its public lands, and therefore violates Article VI of the Constitution of the United States, as well as the Fifth and Tenth Amendments to the Constitution of the United States, in that such holding attempts to deprive a sovereign State of the title to its public lands reserved to it by treaty without due process of law.

In the case of *Texas & Pacific Ry. Co. v. State*, 142 Tex. 482, 78 S.W. 2d 580 (1935), certiorari denied, 296 U.S. 581 (1935), it was held that railroad companies acquiring rights-of-way over the public lands of the State of Texas acquired only easements as provided in Article 6339, Texas Civil Statutes (App. 30). Under the provisions of Article 6339 such easements for rights-of-way remain the property of a railroad corporation chartered under the laws of Texas only during the time it maintains that status by complying with the Constitution and laws of the State of Texas. Although Article 6339 provides that such rights-of-way shall not be lost by forfeiture or expiration of the charter, they only remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation. Manifestly, the transfer of the title to such rights-of-way to the reorganized foreign corporation is not an extension of the charter of the Texas subsidiary railroad company debtor nor is the acquisition thereof by the reorganized foreign railroad corporation comprehended within the "grant of a new charter over the same way without a new condemnation," since the reorganized railroad corporation is not organized under the laws of Texas and cannot receive a permit to engage in intrastate commerce in Texas.

Conceding that under the provisions of Section 77 (f) of the Bankruptcy Act the Plan of Reorganization shall be put into effect notwithstanding the laws of the State of Texas to the contrary, nevertheless the legality of the title to and the right to use the rights-of-way acquired by Texas railroad corporations over public lands or highways of the State is a question of law for interpretation and decision by the highest Court of the State of Texas, and neither the Interstate Commerce Commission or the District Court could be given plenary jurisdiction to interpret and apply such State law. *Schwabacher v. United States*, 334 U.S. 182, 190, 198 (1948).

Although this specific question of law was twice urged before the Interstate Commerce Commission (TR 14-15, 19), again presented to the District Court (TR 83-85), and to the Court of Appeals (TR 131-132), nevertheless the Interstate Commerce Commission, the District Court, and the Court of Appeals each failed to rule specifically upon such point of error, thus presenting a substantial and important question, involving both Federal and State law, which should be decided by this Court if the Plan of Reorganization is to provide effective means for its execution.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued under the Seal of this Honorable Court and directed to the Court of Appeals for the Eighth Circuit, directing that Court to certify and send to this Court for its review and determination, on the day to be named therein, a transcript of the record of the proceedings herein; that the judgment of said Court of Appeals be reversed insofar as it provides for the consolidation or merger of the Texas

railroad subsidiary debtors with the reorganized company, and that your Petitioner have such other and further relief in the premises as this Honorable Court may deem mete and just.

Respectfully submitted
STATE OF TEXAS, *Petitioner*

By PRICE DANIEL
Attorney General of Texas

By C. K. RICHARDS
Assistant Attorney General

Address:
State Capitol
Austin, Texas

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinion of Court Below

The opinion of the Court of Appeals (CR 14-36) is reported in 191 F. 2d 265.

II.

Preliminary Statement

The Summary Statement of the Matter Involved, Statement as to Jurisdiction, and Statement of Questions Presented appear in the foregoing Petition for Certiorari (*ante*, pages 1 to 14), and are adopted without repetition.

III.

Specification of Errors

(1) The Court of Appeals erred in holding that the provisions of Section 77 of the Bankruptcy Act dele-

gated to the Interstate Commerce Commission and the District Court authority to vest the power of eminent domain in a foreign railroad corporation engaged in interstate commerce in a State where, under its Constitution and laws, the exercise of such power was prohibited.

(2) The Court of Appeals erred in holding that the Plan of Reorganization approved by the Interstate Commerce Commission and the District Court provided adequate means for its execution insofar as it authorized the transfer of the title to and the use of easements for rights-of-way over public lands and highways acquired by subsidiary railroad company debtors chartered under the laws of the State of Texas, to the reorganized foreign railroad company which is prohibited by the Constitution and laws of Texas from obtaining a permit to engage in intrastate business therein, since upon such transfer the title to and the right to use such easements would revert to the sovereign upon the breach of a condition subsequent.

IV.

SUMMARY OF ARGUMENT

(1) The power to exercise the right of eminent domain to secure railroad rights-of-way over the public lands and highways of a sovereign State in violation of the Constitution and laws thereof cannot be granted to a foreign railroad corporation as a federally delegated power under the provisions of Section 77 of the Bankruptcy Act.

(2) Where easements for railroad rights-of-way over the public lands and highways of a sovereign State, granted to domestic railroad companies under

the Constitution and laws of that State, revert to the sovereignty upon the breach of a condition subsequent, neither the Interstate Commerce Commission nor the District Court in proceedings for reorganization of such railroads under the provisions of Section 77 of the Bankruptcy Act can authorize the conveyance of the legal title to or the use of such easements for rights-of-way to the reorganized foreign railroad corporation.

V.

ARGUMENT

(1) The power to exercise the right of eminent domain to secure railroad rights-of-way over the public lands and highways of a sovereign State in violation of the Constitution and laws thereof cannot be granted to a foreign railroad corporation as a federally delegated power under the provisions of Section 77 of the Bankruptcy Act.

The Court of Appeals, in affirming the power of the Interstate Commerce Commission to delegate the power of eminent domain to the reorganized company over the lands, public and private, in the State of Texas, relies upon the decision of this Court in *Seaboard Airline R. Co. v. Daniel*, 333 U.S. 118 (1948), which holds that the federally conferred powers granted by Section 5(11) of the Interstate Commerce Act may be exercised by the reorganized corporation in the same manner as though they had been granted to a federally created corporation. Petitioner contends that Section 77 of the Bankruptcy Act does not confer the Federal power of eminent domain upon the reorganized corporation, either by specific grant or by implication.

Section 77 of the Bankruptcy Act authorizes the transfer of any interest in or control of all or any part of the property of the debtor to another corporation by merger or consolidation (Sec. 77(b)(5), the laws of any State to the contrary notwithstanding (Sec. 77(f)). This is the sole authority granted to the Interstate Commerce Commission and the District Court under the powers delegated by the Congress in matters of bankruptcy. Such delegated powers are wholly distinct from the powers delegated by the Congress to regulate commerce. *Calloway v. Benton*, 336 U.S. 132, 140 (1949).

The power to exercise eminent domain in the regulation of commerce in the several States is inherent in the United States, but such power may be specifically delegated by the Congress to a private corporation. *Cherokee Nation v. Kansas R.R. Co.*, 135 U.S. 641, 656 (1893); *California v. Central Pacific R.R. Co.*, 127 U.S. 1, 39, 40 (1887). In the absence of such specific statutory delegation a foreign railroad corporation is without power to exercise the right of eminent domain in a State wherein the exercise of such power is prohibited or where such power has been withheld. *Evansville & Henderson Traction Co. v. Henderson Bridge Co.*, 141 Fed. 51 (C.C.A. 6th Cir. 1905); *St. Louis & S. F. R. Co. v. Foltz*, 52 Fed. 627 (C.C.W.D. Ark., 1892).

In *Western Union Telegraph Co. v. Penn. R.R. Co.*, 195 U.S. 540, 569 (1904), this Court held:

> "But in the act of July, 1866, *there is not a word which provides for condemnation or compensation.* The rule that when a right is given all the means of exercising it are given does not, as we have seen, apply to the extent contended for

> by the Telegraph Company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication, and this was the reasoning in the *Pensacola* case and applied directly to the act of 1866. We may repeat the language of the court: 'If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.' "

It has long been settled law in Texas that a railroad company must be legally incorporated *in Texas* before it may exercise power of eminent domain delegated to it by the sovereign. When such railroad company ceases to comply with the Constitution and laws of Texas by failing to maintain its corporate existence therein, it may not avail itself of the power of eminent domain, since such legislative delegation of authority is granted only to railroad corporations which are chartered by and in compliance with the Constitution and laws of Texas. *Texas & New Orleans R.R. Co. v. Schoenfeld,* 136 Tex. 173, 176, 146 S.W. 2d 724 (1949), and authorities therein cited; *Fort Worth & D. C. Ry. Co. v. Ammons,* 215 S.W. 2d 407, 410 (Tex. Civ. App. 1948, error ref.).

The Court of Appeals held that the plan of reorganization which authorized the merger or consolidation of the 14 Texas debtors with the new company would result in economy of operation, would be in the public interest, and an advantage to all debtors, and stated that such findings were supported by material and substantial evidence. (CR 22-23.) Conceding, *arguendo* only, that such factual findings were

based upon substantial evidence, Petitioner contends that the reorganized corporation, not being incorporated in the State of Texas and therefore being deprived of the right of eminent domain, could not construct and operate spur or industrial tracks under the provisions of Article 6316a, Texas Civil Statutes (App. 29) or enter upon any lands, either publicly or privately owned, in order to make a survey for the purpose of constructing such tracks under the provisions of Article 6318 (App. 29) or to construct its road across, along or upon any stream of water, watercourse, street or highway, under the provisions of Articles 6320 and 6331 (App. 29, 30). Being without the power of eminent domain, when the new company desired to avail itself of any of the rights just enumerated, it would have to enter into contracts with the State of Texas or its various political subdivisions, or with private persons, to accomplish its needs. It could not avail itself of the provisions of Article 6336 (App. 30) which provide that whenever a railroad corporation shall be unable to agree with an owner for the purchase of real estate or material thereon required for the transaction of its business, such corporation may acquire such property by condemnation.

This Court may take judicial notice that condemnation proceedings are resorted to by municipal or private corporations vested with the power of eminent domain, only when they have been unable to enter into "arm's length" contracts with the seller because the "asking" price of the land or material is greatly in excess of the actual market value thereof. Bearing this in mind, Petitioner contends that to so deprive the new company of the advantages heretofore enjoyed by its 14 Texas subsidiary companies, who have been and

still are complying with the Constitution and laws of the State of Texas, would not be in accord with the national transportation policy or be in the public interest and, in addition, would constitute a burden upon the new company in the management and operation of an efficient transportation system in the national interest.

Being deprived of the advantages which it presently enjoys under its present system operation as the "Missouri Pacific Lines," the new company would be at a distinct disadvantage to continue such operation in competition with other major railroad systems now operating in the State of Texas in compliance with its Constitution and laws. Neither the Interstate Commerce Commission, the District Court, nor the Court of Appeals specifically passed upon this contention of the State of Texas, but, each erroneously assumed that the question had been finally disposed of by the ruling of this Court in *Seaboard Airline R. Co. v. Daniel, supra.*

Petitioner urges that being deprived of the power of eminent domain in the State of Texas, the merger or consolidation of the Texas subsidiary debtors with the reorganized company would not result in economy of operations or be in the public interest or of advantage to all the debtors, as a matter of law, and therefore the Plan of Reorganization is defective insofar as it provides for the merger or consolidation of the Texas subsidiary debtors with the new company.

(2) Where easements for railroad rights-of-way over the public lands and highways of a sovereign State, granted to domestic railroad companies under the Constitution and laws of that State, revert to the sovereignty upon the breach of a condition subse-

quent, neither the Interstate Commerce Commission nor the District Court in proceedings for reorganization of such railroads under the provisions of Section 77 of the Bankruptcy Act can authorize the conveyance of the legal title to or the use of such easements for rights-of-way to the reorganized foreign railroad corporation.

Railroads in Texas are declared to be public highways by the provisions of Article X, Section 2 of the Constitution of Texas. (App. 28.) The 14 railroad company subsidiary debtors, chartered under the laws of the State of Texas to operate their lines of railway in intrastate commerce, secured the easements for rights-of-way over the public lands and highways of the State of Texas under the provisions of Articles 6317, 6320, 6331, 6339, and 6340, Texas Civil Statutes (App. 29, 30, 31).

In connection with the granting of the charters to the Texas railroad company debtors and the acquisition by such debtors of the easements for rights-of-way and other easements authorized by the Constitution and laws of the State of Texas, such authorizations or grants were and are limited to railroad companies incorporated under the laws of the State of Texas which own, operate, and maintain their lines of railway in compliance with the Constitution and laws of Texas and not in violation thereof. (Art. X, Secs. 1, 3, 6, Texas Constitution; Art. 6260, Texas Civil Statutes) (App. 28).

When the Republic of Texas was annexed to the United States by treaty under the joint resolutions of the Congress of the United States, approved June 23,

1845, the State of Texas retained all of the vacant and unappropriated lands lying within its limits.[4]

By a Joint Resolution passed April 29, 1846, the First Legislature of the State of Texas declared, "That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of said Republic; that such *exclusive right* is now vested in and belongs to the State. . . ." (Acts of the First Legislature, 1846, p. 155.)

Not only did Texas retain her public lands, but likewise the power of eminent domain, except where granted to the United States by State statute. In an opinion by the Attorney General of the United States it was held that the Federal Government had no power to condemn land in Texas for military purposes and that "The eminent domain of the Mexican Republic in Texas passed to the Republic and State of Texas and never vested in the United States". 8 Opinions of Attorney General of United States 333 (Opinion by Hon. Cale C. Cushing of Massachusetts).[5]

It is settled law in Texas that railroad companies acquiring rights-of-way over the public lands of the

[4]2 Gammel's Laws of Texas 1200; 9 U.S. Statutes at Large, 108; See *United States v. Texas*, 339 U.S. 707, 714 (1950); *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181 (1945), aff'd 158 F. 2d 554 (C.C.A. 5th 1946), cert. den. 331 U.S. 808 (1947), reh'g den. 331 U.S. 867 (1947); *State v. Jadwin*, 85 S.W. 490 (Tex. Civ. App. 1904, error ref.). Compare *Stearns v. Minnesota*, 179 U.S. 223 (1900).

[5]Since the United States owns no public lands in Texas, an attempted grant of public lands therein by the United States would be a nullity. *Coffee v. Grover*, 123 U.S. 1 (1887); *Kenedy Pasture Co. v. State of Texas*, 111 Tex. 200, 231 S.W. 683 (1921).

State of Texas acquire only easements which are not lost by forfeiture or expiration of the charter of the railroad corporation, but remain *subject* to an extension of the charter or the grant of a new charter over the same right of way without a new condemnation. In *Texas & Pacific Railway Co. v. State,* 52 S.W. 2d 957, 960 (Tex. Civ. App. 1932), aff'd, 124 Tex. 482, 78 S.W. 2d 580 (1935), cert. den. 296 U.S. 581 (1935), it was held:

> ". . . Without further discussion of the matter we think it is clear that, when appellant railroad company undertook the construction of its road over the public lands of the state in 1881, it did so subject to the laws of the state then in force relating thereto. The fact that it was chartered by the United States did not relieve it from such regulation so far as the state's public lands or police power were concerned. We conclude, therefore, that under the pleadings and the agreed statement of facts appellant does not have a fee-simple title to its right of way over the lands in question."

In *Texas Central Railroad Company v. Bowman,* 97 Tex. 417, 423, 79 S.W. 295 (1904), the Court held:

> "The right granted to any company is only the use of a narrow strip of land of which the fee is not acquired by the railroad company but remains in the State subject to its disposal; and the right of the railroad company is held subject to all conditions and limitations which by law attach to such property."

Petitioner contends that the easements for rights-of-way granted to the Texas railroad company debtors are permissive grants or franchises which inure to the benefit of the railroad companies only as long as they

maintain their status as Texas corporations in compliance with the Constitution and laws of the State of Texas. The right to use the easements over public lands and highways of the State, acquired by the Texas railroad companies, would be terminated by an attempted transfer of such easements to a foreign railroad corporation which is prohibited by the Constitution and laws of the State of Texas from engaging in intrastate commerce within the State of Texas.[6] Such rights-of-way are granted by the State over the public lands of Texas as a matter of public policy, without compensation, and are not evidenced by any muniments of title emanating from the State of Texas, except in rare instances where such Texas railroad companies were incorporated under special charters by special Acts of the Legislature. The easements for rights-of-way are not forfeited by the forfeiture or expiration of the charter of the railroad corporation, but remain *subject* to the extension of the charter or the grant of a new charter by the State of Texas over the same right-of-way. (Art. 6339, Texas Civil Statutes, App. 30)[7]

Since the title to and the disposition of the public lands of Texas have been vested in the sovereign State

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[6]Art. X, Sec. 6, Constitution of Texas (App. 28); Arts. 1529, 1538, 6260, 6287, Texas Civil Statutes (App. 31, 28); *East Line & Red River Ry. Co. v. Texas*, 79 Tex. 434, 12 S.W. 690 (1889); *International & G. N. Ry. Co. v. Anderson County*, 174 S.W. 305 (Tex. Civ. App. 1915, error ref.), aff'd 206 U.S. 424.

[7]Railroad rights-of-way acquired by condemnation proceedings are easements only. *Calcasieu Lumber Company v. Harris*, 77 Tex. 18, 13 S.W. 453 (1890); *Brightwell v. I.G.N.R. Co.*, 121 Tex. 338, 49 S.W. 2d 437 (1932); *Right-of-Way Oil Co. v. Gladys City O. G. & M. Co.*, 106 Tex. 94, 157 S.W. 737 (1913); *Kymerd v. Hulen*, 5 F. 2d 160 (5th Cir. 1925), cert. den. 269 U.S. 560.

of Texas prior to and since it became one of the States of these United States, the Interstate Commerce Commission and the District Court are wholly without any authority, express or implied, under the provisions of Section 77 of the Bankruptcy Act, to authorize the transfer of the title to and the right to use the easements for rights-of-way acquired by the 14 Texas subsidiary debtors over the public lands belonging to and part of the State of Texas, to the reorganized foreign railroad corporation which is prohibited by the Constitution and laws of the State of Texas from engaging in any commerce other than interstate within the State of Texas. Insofar as the Plan of Reorganization attempts to authorize transfer of the rights-of-way over public lands of the State of Texas now held by the 14 Texas subsidiary railroad company debtors to the reorganized company, it violates Article VI of, and the Fifth and Tenth Amendments to, the Constitution of the United States and is manifestly arbitrary and void. *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91, 92 (1912). Hence the Plan of Reorganization does not provide adequate means for its execution.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court confirming the Plan

of Reorganization of the Missouri Pacific Railroad Company, Debtor.

STATE OF TEXAS, *Petitioner*

By PRICE DANIEL
Attorney General of Texas

By C. K. RICHARDS
Assistant Attorney General

Counsel for Petitioner

APPENDIX

THE TEXAS CONSTITUTION AND STATUTES

Pertinent provisions of the Constitution and laws of the State of Texas are as follows:*

Article X, Constitution of Texas.

"Sec. 1. (in part) Any railroad corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other states. . . ." (Page LV)

"Sec. 2. (in part) Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. . . . (Page LV)

"Sec. 6. No railroad company organized under the laws of this State, shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other State or of the United States." (Page LVI)

Applicable provisions of Title 112, Railroads, of the Revised Civil Statutes of Texas, 1925, are:

"Art. 6260. No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct any railways within State." (Page 1774)

"Art. 6287. The public office of a railroad corporation shall be considered the domicile of such corporation." (Page 1777)

"Art. 6316. Any railroad corporation shall have the right to construct and operate a railroad

*All page references are to Vernon's Texas Statutes (1948 Edition), Vol. 1.

between any points within this State, and to connect at the State line with railroads of other States." (Page 1779)

"Art. 6316a. Every railroad company owning, leasing or operating a line of railroad in this State shall have authority and power to construct and operate spur or industrial tracks designed to reach or serve industries or industrial enterprises, such as mills, mines, rock quarries, rock deposits, gravel pits, gravel deposits, smelters, warehouses and other manufacturing or industrial enterprises, over which regular scheduled passenger or freight service will not be performed and for transportation over which only a switching charge, if any, will be made, together with all necessary sidetracks and subsidiary or accessory spur tracks, and shall have power and authority under the General Laws of this State relating to railroads to condemn property for rights of way for any and all such tracks hereby authorized." (Page 1779)

"Art. 6317. Every such corporation (railroad) shall have the right of way for its line of road through and over any lands belonging to this State, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land." (Page 1779) (Parenthetical insertion ours)

"Art. 6318. Every railroad corporation shall have the right to cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route, and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damages that may be occasioned thereby." (Page 1779)

"Art. 6320. Such corporation shall have the right to construct its road across, along, or upon

any stream of water, water course, street, highway, plank road, turnpike, or canal when the route of said railway shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road, turnpike, or canal thus intersected or touched, to its former state, or to such state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair." (Page 1779)

"Art. 6331. In case of the construction of any railway along the highways, plank roads, turnpikes, or canals, such railroad corporation shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same or condemn the same under the provisions of law." (Page 1780)

"Art. 6336. (in part) If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate, or material thereon, required for the purpose of its incorporation or the transaction of its business, for its depots, station buildings, machine and repair shops, for the construction of reservoirs for the water supply, or for the right of way, or for a new or additional right of way, for change, or relocation of road bed, to shorten the line, or any part thereof, or to reduce its grades, or any of them, or for double tracking its railroad or constructing and operating its tracks, which is hereby authorized and permitted, or for any other lawful purpose connected with or necessary to the building, operating or running its road, such corporation may acquire such property by condemnation thereof. . . ." (Page 1780)

"Art. 6339. The right of way secured by condemnation to any railway company in this State shall not be construed to include the fee simple estate in lands, either public or private, nor shall the same be lost by forfeiture or expiration of the

charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation." (Page 1781)

"Art. 6340. The right of way is hereby reserved to any railroad company incorporated by the laws of this State, to the extent of one hundred feet on each side of said road, or roads that cross over or extend through any lands granted, or that may be granted to any railroad company by the Legislature, with the right to take from the lands so granted such stone, timber and earth as such road may need in the construction of its line of road." (Page 1781)

Applicable provisions of Title 32, Corporations, of the Revised Civil Statutes of Texas, 1925, are:

"Art. 1529. Any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other State, or of any territory of the United States, or of any municipality of such State or territory, or of any foreign government, sovereignty or municipality, desiring to transact or solicit business in Texas or to establish a general or special office in this State, shall file with the Secretary of State a duly certified copy of its articles of incorporation; and thereupon such official shall issue to such corporation a permit to transact business in this State for a period of ten years from the date of so filing such articles of incorporation. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes." (Page 543)

"Article 1538. (in part) The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating or maintaining any railway, . . ." (Page 544)

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 416

STATE OF TEXAS,

Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES W. MCCONAUGHY,
MORRIS D. CRAWFORD, JR.,
14 Wall Street,
New York 5, N. Y.,
Attorneys for Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company.

CADWALADER, WICKERSHAM & TAFT,
Of Counsel.

SANFORD H. E. FREUND,
20 Exchange Place,
New York 5, N. Y.,
Attorney for Bondholders Protective Committee, Missouri Pacific Railroad Company General Mortgage.

SHEARMAN & STERLING & WRIGHT,
Of Counsel.

WILLIAM P. PALMER,
PHILIP E. GREGG,
31 Nassau Street,
New York 5, N. Y.,
Attorneys for Bankers Trust Company, Successor Trustee under Missouri Pacific Railroad Company Twenty-Year 5½% Convertible Gold Bonds Indenture.

ROOT, BALLANTINE, HARLAN,
BUSHBY & PALMER,
Of Counsel.

Dated: December 7, 1951.

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Abbreviations Used in this Brief

Commission:	Interstate Commerce Commission.
Court of Appeals:	United States Court of Appeals for the Eighth Circuit.
C.R.:	Transcript of Proceedings in Cause No. 14256 and Causes Nos. 14264-14274 in the United States Court of Appeals for the Eighth Circuit. (One volume)
D.R.:	Fourth Supplemental Report, dated August 2, 1949, and Fifth Supplemental Report and Order, both dated December 29, 1949, of the Commission approving the Plan of Reorganization of Missouri Pacific Railroad Company and affiliated debtors. (One volume)
District Court:	District Court of the United States, Eastern Judicial District of Missouri, Eastern Division.
Missouri Pacific:	Missouri Pacific Railroad Company, the principal debtor in these proceedings.
Plan:	The Plan of Reorganization approved by the Interstate Commerce Commission in its Supplemental Report and Order dated December 29, 1949 (D.R. 28640-28760).
R.:	The printed record on appeal filed in the United States Court of Appeals for the Eighth Circuit in Causes Nos. 14264-14274. (Two volumes)
1941 R.:	The record on appeal filed in the United States Court of Appeals for the Eighth Circuit in appeals numbered 12130-12136, inclusive. (Four volumes)

1946 R.:	The record on appeal filed in the United States Court of Appeals for the Eighth Circuit in appeals numbered 13367 to 13369, both inclusive, and 13371 to 13373, both inclusive. (Three volumes)
Section 5:	Section 5 of the Interstate Commerce Act (49 U.S.C.A. 5).
Section 20a:	Section 20a of the Interstate Commerce Act (49 U.S.C.A. 20a).
Section 77:	Section 77 of the Bankruptcy Act (11 U.S.C.A. §205).
Texas:	The State of Texas.

IN THE

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This brief is filed in opposition to the petition of the State of Texas for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, approving the Plan.

Opinions Below

Court of Appeals—*State of Texas* v. *Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company, et al.*, 191 F. 2d 265 (8th Cir. 1951); (C. R. 14-36).

District Court—*In re Missouri Pacific R. Co.*, 93 F. Supp. 832 (E. D. Mo. 1950); (R. 915-945).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Section 24(c) of the Bankruptcy Act (11 U.S.C.A. Sec. 47(c)) and Section 1254(1) of the Judicial Code (28 U.S.C.A. Sec. 1254(1)).

POINT I

The petition presents no important question of Federal law.

The Plan, as well as prior plans issued by the Commission in 1940 and 1944, provides for the consolidation into a single reorganized company of the Missouri Pacific Railroad Company and affiliated debtors,* including fourteen debtor companies organized under the laws of the State of Texas, and the Commission has found that a System reorganization "will result in economies of operation and is in the public interest and to the advantage of all the debtors" (D. R. 28548; see also, 1941 R., Vol. II, 393-401). The Court below and the District Court have concluded that these findings are supported by material and substantial evidence (C. R. 22-23; R. 941, 949). Texas concedes *arguendo* that the Commission's findings are so supported (Texas brief, pp. 19-20).

Petitioner asserts that the judgment of the Court of Appeals presents two important questions of Federal law (Texas petition, pp. 7-9). The first question is whether Section 77(f) authorizes the Commission or the District Court to vest in a foreign railroad corporation the right of

* Paragraph C of the Plan permits the Reorganization Managers to cause the properties of the International—Great Northern Railroad Company and its subsidiary, Austin Dam and Suburban Railroad Company, to be transferred to a separate corporation (D. R. 28693, 28618).

eminent domain over lands situated in Texas. The second is whether a plan under Section 77(b)(5) can authorize the transfer of rights of way of a Texas railroad corporation to a foreign railroad corporation. Texas contends that because of Texas law both questions require a negative answer.

It may be the law of Texas that upon consummation of the Plan the reorganized company will not have the right of eminent domain, and that the rights of way now enjoyed by the fourteen Texas debtors will revert to the State of Texas. However, none of the cases cited by petitioner so hold.* And even if the law of Texas is as petitioner asserts, the questions posed are not of such importance as to merit consideration by this Court.

(a) A plan of reorganization may direct the transfer of all property rights (including rights of way) of a debtor corporation to the reorganized company regardless of contrary state laws.

The contentions of Texas with respect to the transfer of the rights of way of the Texas debtors can be reduced to a single and simple issue—can the Constitution and the laws of the State of Texas frustrate the exercise of Federal power under the bankruptcy clause of the United States Constitution and under Section 77 of the Bankruptcy Act?

Section 77(b) provides in part:

> "A plan of reorganization within the meaning of this section * * * shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to

* See Point III, below.

another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, * * *".

Section 77(d) provides in part that the Commission "shall render a report and order in which it shall approve a plan, * * * that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; * * *". (11 U.S.C.A. §205(d)).

The Commission has found that the Plan, providing for a System consolidation, meets such requirements and will be compatible with the public interest (D. R. 28630). The Courts below have affirmed those findings (R. 941, 949; C. R. 22-23).

The Commission has consistently taken the position that it has the power under Section 77 to "put into effect and carry out" a plan of reorganization, "the laws of any state * * * to the contrary notwithstanding", and has maintained that the principles of the *Seaboard* case* apply with equal force to Sections 5 and 77 proceedings. This Court's decision in the *Seaboard* case is clear authority that, under the Supremacy Clause of the Constitution,** Congress may, by legislation in the field of interstate commerce, override such legislation, and that it has done so in Section 5 of the Interstate Commerce Act. See also, *Texas* v. *U. S.*, 292 U. S. 522 (1934); *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948).

It appears to be equally clear that Congress, by legislation in the field of bankruptcy,*** may override state

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* *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118 (1948).

** United States Constitution, Art. 1, Sec. 8, Clause 3.

*** United States Constitution, Art. 1, Sec. 8, Clause 4. Section 77 is within the power conferred by this clause. *Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, 294 U. S. 648, 675 (1935).

constitutions and legislation and that Congress has done so in Section 77(f) wherein it provided, in part:

> "(f) * * * Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

In *Stellwagen* v. *Clum*, 245 U. S. 605, 613 (1918), this Court stated:

> "The Federal Constitution, Article I, §8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended * * *."

And in a recent case this Court, discussing the power of the Interstate Commerce Commission, in the exercise of its statutory obligations, to override state laws interposing obstacles in the path of otherwise lawful plans of reorganization, has stated:

> "We have recently reaffirmed that power in cases arising under the Interstate Commerce Act.* Nor is the ambit of federal power less broad in cases arising under the bankruptcy laws of the United

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* The court cited *Seaboard Air Line Railroad Co.* v. *Daniel*, *Schwabacher* v. *U. S.* and *Texas* v. *U. S.*, *supra.*

> States. Section 77(f) of the Bankruptcy Act specifically provides that the plan of reorganization shall be put into effect, 'the laws of any State or the decision or order of any State authority to the contrary notwithstanding' ". *Callaway* v. *Benton,* 336 U. S. 132, 141 (1949).

Texas attacked the power of the Commission to provide for a consolidation in conflict with Texas law in *In re Chicago, Rock Island and Pacific Railway Co.,* 168 F. 2d 587 (7th Cir. 1948). In that case the plan provided for consolidation of a Texas subsidiary (Chicago, Rock Island and Gulf Railway Company) into the reorganized Delaware company. The District Court's consummation decree directed transfer of the subsidiary's properties to the Delaware corporation. Texas contended, among other things, that the consummation decree violated Sections 3 and 8 of Article X of the Constitution of Texas and the statutes of that State, and that, in the absence of a finding that continuance of the separate existence of the Texas subsidiary would constitute an undue burden on interstate commerce, the District Court was without power to order consolidation of the Texas subsidiary into the reorganized Delaware company. *In re Chicago, Rock Island, Pacific Railway Co., supra,* at page 590; see also, page 4 of Texas petition for certiorari in *Texas* v. *Brown,* 335 U. S. 855 (1948). The objections of Texas were overruled both because of delay and on the merits. The Court of Appeals stated:

> "But even had the objections been presented at an opportune stage of the proceeding, nothing now urged would afford any basis for relief. So far as this record discloses, the plan had been formulated, approved and confirmed in full accord with the provisions of the pertinent Bankruptcy sections. The

court has authority to put into effect and carry out the plan approved and confirmed in proper manner, notwithstanding the laws of any state or the decision or order of any state to the contrary. The fact that the plan may infringe upon the provisions of the Texas constitution and laws is wholly immaterial against bankruptcy jurisdiction. In re N. Y., N. H. & H. R. Co., and 2 Cir. 1945, 147 F. 2d 40, 51, certiorari denied 325 U. S. 884, 65 S. Ct. 1577, 89 L. Ed. 1999; Texas *v.* U. S., 292 U. S. 522, 54 S. Ct. 819, 78 L. Ed. 1402; In re Missouri Pacific R. Co., D. C., 39 F. Supp. 436, 438; Seaboard Air Line R. Co. *v.* Daniel, supra. In other words, nothing now urged in respect to infringement of the laws of Texas would, at any time, have afforded the Commission any power to grant the relief the state is insisting it should have." *In re Chicago, Rock Island & Pacific Railway Company, supra,* at page 594.

Texas petitioned this Court for a writ of certiorari to review the *Rock Island* decision. Certiorari was denied *sub nom. Texas* v. *Brown, supra.*

In the *New Haven* reorganization the contention that a plan of reorganization must comply with State laws has been twice rejected by the Court of Appeals. *In re New York, New Haven and Hartford R. R. Co.,* 147 F. 2d 40 (2nd Cir. 1945), cert. den. 325 U. S. 884 (1945); *Commission of Department of Public Utilities of Mass.* v. *New York, New Haven and Hartford R. R. Co.,* 178 F. 2d 559 (2nd Cir. 1949). See also, *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939).

In the *Rock Island* case the arguments of Texas were addressed to the comprehensive question of whether the general provisions of the Texas statutes and constitution prohibiting the ownership or operation of railroads in Texas by a foreign corporation and the consolidation of

a Texas railway company with a foreign company could be overridden by the provisions of a plan of reorganization in the absence of certain supporting findings of fact. In the present petition Texas questions only the Commission's incidental power to authorize the transfer of certain property rights of the Texas debtors, upon consummation of the Plan, to the reorganized company. Furthermore, in this petition, unlike its petition in the *Rock Island* case, Texas concedes *arguendo* that the Commission's findings are properly supported by the evidence. If the Texas petition for certiorari in the *Rock Island* case was insufficient to merit review by this Court, the judgment of the Court below certainly does not present any important Federal question for review.

(b) Even if the reorganized company were denied the right of eminent domain under Texas law, the petition fails to demonstrate that the plan would thereby be rendered impracticable or defective.

Texas asserts that the reorganized company, deprived of the power of eminent domain, "would be at a distinct disadvantage" in continuing its Texas operations in competition with other major railroad systems now operating in Texas, and that the Plan in this respect is impracticable and defective (Texas petition, p. 21). As pointed out below (Point III), Texas is unable to show that the Texas courts have held or will hold that a foreign corporation organized pursuant to a lawful plan of reorganization is deprived of the right of eminent domain in Texas. And even if the reorganized company were deprived of this right, Texas has failed to show that the Plan would thereby be rendered impracticable or that the operations of the reorganized company would be adversely affected. At least

two other major railroad systems organized under foreign law are operating substantial trackage in the State of Texas. The Kansas City Southern Railway Co., a Missouri corporation, has owned and operated Texas trackage since January 1, 1944, and the Chicago, Rock Island & Pacific Railway Co., a Delaware corporation, has operated its Texas properties since the consummation of its plan of reorganization on January 1, 1948. *Kansas City Southern Ry. Co.* v. *Daniel,* 180 F. 2d 910 (5th Cir., 1950); *In re Chicago, Rock Island & Pacific Railway Co., supra.*

POINT II

There is no conflict between the judgment of the Court of Appeals and the decisions of this Court.

Petitioner asserts that the holding of the Court below is in direct conflict with *Callaway* v. *Benton, supra, California* v. *Central Pacific Railway Co.,* 127 U. S. 1 (1888) and other decisions of this Court (Texas petition, p. 9).

In the *Callaway* case the plan of reorganization of the Central of Georgia Railway Co. provided in the alternative for acceptance by South Western Railway Company of an offer to purchase its properties (theretofore under lease to Central) or disaffirmance of the lease by Central. South Western was not in reorganization. The officers of South Western sought to accept the offer of purchase by majority vote of South Western's stockholders. The Georgia court enjoined the sale because of provisions of Georgia law requiring unanimous stockholder approval of a sale of assets. The District Court declared the state court's injunction null and void. The Court of Appeals reversed. On review this Court affirmed the judgment of the Court of Appeals holding that the controversy in

the state court "did not involve property of the debtor within the jurisdiction of the bankruptcy court, and the assertion of jurisdiction by the state court is not inconsistent with the provisions of the Bankruptcy Act." *Callaway* case, *supra*, page 151. This Court further stated:

> "The statute does not, however, give the Commission or court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property, and no such power has been asserted by the Commission in this case. The plan of reorganization in effect hands South Western a contract of sale. Whether or not South Western signs the contract must depend not only upon its business judgment, but also upon the charter of the company and the laws of the state of its incorporation. There is therefore no occasion to override state law. The plan implicitly accepts it as controlling." *Callaway* case, *supra*, page 141.

Texas fails to demonstrate how the *Callaway* decision can possibly conflict with the decision of the Court below. In its petition Texas underscores this Court's language in the *Callaway* case to the effect that the Commission's power to provide for mergers under Section 77 "flows from a different source than the power over consolidations under the Interstate Commerce Act". (Texas petition, p. 9). In the *Callaway* case this Court made it clear that the "ambit of federal power" is as broad under Section 77 as it is under Section 5. (See *supra*, pp. 5-6.)

To demonstrate the asserted conflict between the decision of the Court below and *California* v. *Central Pacific Railway Co.*, *supra*, petitioner apparently relies on this Court's statement in the *Central Pacific* case that "the right of eminent domain can only be exercised by virtue of a legislative grant". *Central Pacific Rail-*

way Co. case, *supra*, at page 40 (Texas petition, p. 10). There is no statement in the decision below which conflicts with this proposition. Indeed there is no statement in the Plan or any of the decisions below which purports to deal with eminent domain.

Petitioner states that the power of eminent domain is granted to the Commission in Section 5(11) of the Interstate Commerce Act and that this Court so held in the *Seaboard* case, *supra* (Texas petition, pp. 10 and 11). Petitioner argues that there is no grant of such power in Section 77. The *Seaboard* case and Section 5(11) may be searched in vain for any mention of "eminent domain".

POINT III

Until the courts of Texas have ruled on the questions raised by the petitioner they should not be reviewed by this Court.

None of the cases cited by petitioner purports to deal with the questions sought to be raised by petitioner. The Texas cases cited at page 19 of the Texas brief* declare merely that a railroad corporation "legally incorporated under the law"** may avail itself of the right of eminent domain. Neither case involved any Federal question. Likewise, neither the *Evansville* nor the *St. Louis and S. F. R. Co.* case cited at page 18 of the Texas brief involves any attempt by a foreign corporation acting

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* *Texas & New Orleans R. Co.* v. *Schoenfeld*, 136 Tex. 173; 146 S. W. 2d 724 (1941); *Fort Worth & D. C. Ry. Co.* v. *Ammons*, 215 S. W. 2d 407 (Tex. Civ. App. 1948, error ref.).

** Presumably the law of Texas, although the opinions do not specify.

under Federal legislation implementing the Bankruptcy or Commerce Clauses of the Constitution to exercise the right of eminent domain. The case of *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.* also cited at page 18 of the Texas brief is not apposite. In that case the Telegraph Company sought to erect telegraph lines on the right of way of the Railroad Company, claiming it had the right to do so by virtue of the power of eminent domain under the Act of 1866. The holding in the case was that the statute merely granted to telegraph companies the right to construct and operate telegraph lines through, along and over the public domain, military or post roads and navigable waters of the United States and did not purport expressly or by implication to grant the right of eminent domain with respect to private property. The rights of way of railroad corporations were held to be private property. Nor is a single case cited by petitioner holding that rights of way of a Texas railroad corporation revert to the State upon the consummation of a plan of reorganization.

In short the courts of Texas have not, so far as the petition shows, ever determined that the right of eminent domain shall be denied to a foreign railroad corporation, organized pursuant to an otherwise lawful plan of reorganization under Section 77, or that upon merger with a foreign corporation under such a plan the rights of way of a Texas railroad will revert to the State or to former owners. The mere arguments of the Attorney General in the petition and brief do not dispose of these questions nor create an obstacle to the execution of the Plan. Unless and until the Texas courts deal with these questions and reach a result in conflict with the Federal power, they will not merit consideration by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHARLES W. MCCONAUGHY,
MORRIS D. CRAWFORD, JR.,
14 Wall Street,
New York 5, N. Y.,
Attorneys for Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company.

CADWALADER, WICKERSHAM & TAFT,
Of Counsel.

SANFORD H. E. FREUND,
20 Exchange Place,
New York 5, N. Y.,
Attorney for Bondholders Protective Committee, Missouri Pacific Railroad Company General Mortgage.

SHEARMAN & STERLING & WRIGHT,
Of Counsel.

WILLIAM P. PALMER,
PHILIP E. GREGG,
31 Nassau Street,
New York 5, N. Y.,
Attorneys for Bankers Trust Company, Successor Trustee under Missouri Pacific Railroad Company Twenty-Year 5½% Convertible Gold Bonds Indenture.

ROOT, BALLANTINE, HARLAN,
BUSHBY & PALMER,
Of Counsel.

Dated: December 7, 1951.

FILED
DEC 10 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 416

STATE OF TEXAS,

Petitioner,

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
WOLFF & BROPHY,
25 Broadway,
New York 4, N. Y.
Of Counsel.

Dated: New York, N. Y.
December 6, 1951.

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Record references in this brief are as follows: C. R.=Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

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D. R.=The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 416

STATE OF TEXAS,
Petitioner,

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION

Opinions Below

The opinion of the District Court (Texas R. 87-117)* is reported at 93 F. Supp. 832 (E. D. Mo., 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36) is reported at 191 F. 2d 265 (8th Cir., 1951). The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I.C.C. 59, 203.

Jurisdiction

The judgment of the Court of Appeals was entered on August 14, 1951 (C. R. 37). The jurisdiction of this Court

*See footnote page iii, *supra*.

is invoked under Section 24c of the Bankruptcy Act (11 U. S. C., Sec. 47c) and under 28 U. S. C., Sec. 1254(1).

Questions Presented

The two questions presented in the Petition for Writ of Certiorari (pp. 8-9), it is respectfully submitted, do not state the real questions presented by the record. Respondent suggests that the only question involved is:

When the Interstate Commerce Commission, pursuant to Section 77(b)(5) of the Bankruptcy Act, 11 U. S. C., Sec. 205(b)(5), approves a plan of reorganization for an interstate railroad system, which provides that the properties of the constituent corporations of the system, all of which are in reorganization, be merged or consolidated into one new corporation, which may not be a Texas corporation, and this provision is supported by findings that substantial economies will result from the consolidation or merger of the system companies and that separate incorporation of the system lines would not accord with the national transportation policy, will not be consistent with the public interest and will constitute a burden on the obligations of the companies efficiently to render transportation services in interstate commerce, can the State of Texas nevertheless successfully challenge and thwart the plan of reorganization solely because its local law requires that Texas properties of this interstate railroad system be owned by Texas corporations.

Statement

The Missouri Pacific system comprises three major units: (1) the Missouri Pacific Railroad Company and its wholly owned subsidiaries, which together own about 6,328 miles but operate about 7,236 miles of railroad, (2)

the New Orleans, Texas & Mexico Railway Company and its subsidiary railroad companies (commonly called the Gulf Coast lines), which together own about 1,623 miles but operate about 1,860 miles of railroad, and (3) the International-Great Northern Railroad Company and its subsidiary, which together own about 1,000 miles but operate about 1,155 miles of railroad (1941 R. 302-309).

The International-Great Northern, its subsidiary, and twelve of the Gulf Coast subsidiary corporations have all their railroad property in Texas and are now incorporated in Texas. Texas objects to the consolidation or merger of these corporations into a single reorganized company, along with the other railroad corporations making up the Missouri Pacific system, unless the new company is incorporated in Texas.

All of the capital stock of the International-Great Northern is owned by the New Orleans, Texas and Mexico Railway Company, a Louisiana corporation. Approximately 95% of the capital stock of the New Orleans, Texas & Mexico Railway Company is owned by the Missouri Pacific Railroad Company, a Missouri corporation (1941 R. 305, 308).

The Missouri Pacific system serves the states of Missouri, Kansas, Colorado, Arkansas, Louisiana, and Texas, as well as parts of Illinois, Nebraska, and Oklahoma. Two gateways are afforded to the West Coast and three to Mexico (1941 R. 309).

The present plan of reorganization is the third to be approved by the Interstate Commerce Commission for the Missouri Pacific system. All three plans have provided for consolidation of the system properties into one corporation. Paragraph B of the first plan approved by the Interstate

Commerce Commission on April 9, 1940, provided (1941 R. 505, 506):

> **B.** The properties of the debtors, and of the Kansas-Missouri Elevator Company, Natchez & Louisiana Railway Transfer Company and Velasco Wharf & Warehouse Company shall be merged or consolidated by transfer of the properties of all of such companies to a new company, or, in the discretion of the reorganization managers (hereafter provided for) with the approval of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, hereinafter re- [fol. 620] ferred to as the court, to the Missouri Pacific, the reorganized company being hereinafter referred to in either case as the new company. All such transfers shall be made subject to and in accordance with this plan.

The Commission's report with respect to this feature of the plan said, in part (1941 R. 299, 398; 239 I. C. C. 7, 85):

> "The proposed consolidation covers only owned properties which at the present time are being operated as a system. The record shows that certain economies may reasonably be expected to be effected thereby and that better service probably will result from continued system operation rather than from separate operation. A consolidation of the various system companies upon reorganization will permit a simplified capital structure."

The Commission concluded (1941 R. 400-401; 239 I. C. C. 7, 87):

> "The record* is persuasive that the proposed consolidation will result in benefit to the public, to

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*See Texas R. 29-59

> the creditors of the debtors and to such of their stockholders as may have an interest in the new company . . . We find that, upon the record in this proceeding, and as a part of a plan of reorganization of the debtors, the proposed consolidation of the properties of all the debtors herein, excepting the Missouri-Illinois, will meet with the requirements of subsections (b) and (e) of Section 77 of the Bankruptcy Act, as amended, and will be compatible with the public interest."

The District Court approved the plan and with respect to this feature of it said in part (39 F. Supp. 436, 448):

> "The general offices of the Missouri Pacific have long been maintained at St. Louis, and in the event of consolidation of all or part of the Texas lines with the remainder of the system lines, it will not be feasible to move the general offices from St. Louis.
>
> "The Court is therefore of the opinion that notwithstanding certain statutes of the State of Texas . . . this Court in the carrying out of the plan, is vested with authority to direct the acquisition and operation of the properties of the so-called Gulf Coast Lines by a corporation to be organized under the laws of such foreign State as the Court may approve and with principal offices and officers situated in the City of St. Louis."

For the reasons set forth in its opinion, the District Court modified the plan to allow for the separate incorporation in Texas of the International-Great Northern Railroad Company and its one subsidiary, if such a step were actually necessary when the plan should be consummated (39 F. Supp. 436, 448-49).

Various dissatisfied parties appealed to the Court of Appeals for the Eighth Circuit, and on May 8, 1943, with-

out deciding the case on the merits, that Court referred the plan back to the District Court to determine whether "in view of changed conditions and the decisions of the Supreme Court under date of March 15, 1943, in the cases involving the reorganization of the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific Railroad Companies," the plan should be referred back to the Interstate Commerce Commission for further consideration (1946 R. 48). On July 29, 1943 the District Court referred the plan back to the Commission (1946 R. 126-27).

After further hearings, the Interstate Commerce Commission on October 13, 1944, approved another plan of reorganization for the system (1946 R. 793-852) which, like the 1940 plan, provided for the consolidation of the system lines into one corporation and added a provision for the possible separate incorporation of the International-Great Northern and its subsidiary (1946 R. 797, Par. C; see also 1946 R. 756; 257 I. C. C. 479, 559). On January 22, 1946, the District Court approved the plan (1946 R. 1119, 1123; 64 F. Supp. 64). Various parties appealed, and once again in September, 1947, the Court of Appeals, without deciding the case on the merits, referred it back to the District Court, this time with directions to return the plan to the Commission for its further investigation, consideration and recommendation (*Wright* v. *Group of Institutional Investors,* etc., 163 F. 2d 1022).

At this stage of the case, Texas finally intervened as a party to the proceedings (Texas R. 1-8).

In March, 1948 further hearings on the plan were held before the Interstate Commerce Commission. On December 29, 1949, the Commission approved a plan modifying to some extent the plan which had been returned to it, but

made no change in the provision for consolidation or merger of the debtors included in the plan (Plan of Reorganization as modified December 29, 1949, Par. C.,* D. R. 28693). In its report accompanying the plan, the Commission discussed and rejected the contentions of the State of Texas (Fourth Supplemental Report, D. R. 28613-618), and was upheld by the District Court (Texas R. 86, 111-112, 120; 93 F. Supp. 832, 852), and by the Court of Appeals (C. R. 14, 21-25; 191 F. 2d 265, 270-71).

In the light of the history of this proceeding, Texas properly does not ask this Court to review the findings in favor of a system reorganization of the Missouri Pacific system, as opposed to a breakup of the system into its constitutent lines operating as separate and independent companies. Instead Texas asks this Court to review only a

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* "C. *Transfer of properties.*—The properties of the debtors and of the Kansas-Missouri Elevator Company and Natchez & Louisiana Railway Transfer Company shall be merged or consolidated by transfer of the assets and properties of all such companies to a new company, or, in the discretion of the reorganization managers with the approval of the court, to the Missouri Pacific, the reorganized company being hereinafter referred to in either case as the new company. The new company shall be incorporated under the laws of such State and shall have its general offices at such place as the court may direct, the laws of any State to the contrary notwithstanding. In the discretion of the reorganization managers and with the approval of the court, (a) the assets and properties of the International and Austin Dam & Suburban Railway Company may be transferred to the International or to a separate new company (either of which is hereinafter called the reorganized International), and (b) the assets and properties of the Natchez & Southern Railway Company and Natchez & Louisiana Railway Transfer Company may be transferred to the new company or to a separate new company (which latter is hereinafter called the reorganized Natchez). Any such transfer may be effected by a merger, consolidation, transfer of assets, and/or by any other means approved by the reorganization managers. All such transfers shall be made subject to and in accordance with the plan."

detail of the system reorganization—the provision which would permit the reorganized company to be incorporated under the laws of a state other than Texas (Cf. Texas R. 65).

Argument

The plan of reorganization provides for the consolidation of the system companies into one corporation. While the plan does not specifically state where the reorganized corporation shall be incorporated, it is most probable that Missouri will be the state of incorporation. See *In re Missouri Pac. R. Co.*, 39 F. Supp. 436, 448.

Petitioner asserts that its laws require that the consolidated company be incorporated in Texas or else no consolidation as envisaged by the plan can take place. But the short answer to this is that the Bankruptcy Act grants power to the Interstate Commerce Commission to approve as part of a reorganization plan the consolidation of the debtors "the laws of any State or the decision or order of any State authority to the contrary notwithstanding" (Bankruptcy Act, Sec. 77(b) and (f); 11 U. S. C., Sec. 205(b) and (f). Congress could hardly have been more explicit in granting this power to the Commission to override state laws. Indeed, petitioner does not directly assail the right of the Commission to exercise the power granted to it. Instead it seeks to undermine the exercise of that power by pointing to various disabilities under which it claims a foreign railroad corporation would labor under Texas law. But this cannot obscure the only real question here presented—can Texas set up its local law as a barrier to a consolidation to be accomplished under Section 77 of the

Bankruptcy Act. The Interstate Commerce Commission and the Courts below have said no, and the prior decisions of this Court clearly indicate their conclusions were correct.

I

THE QUESTION PRESENTED HAS BEEN DECIDED BY THIS COURT ADVERSELY TO PETITIONER'S CONTENTIONS.

In rejecting petitioner's contentions, the Interstate Commerce Commission placed primary emphasis (D. R. 28613) on the decision of this Court in *Seaboard Air Line Railroad Co.* v. *Daniel, Attorney General,* 333 U. S. 118 (1948). Respondent submits that the Commission was correct in relying on the *Seaboard* case; that it is a square holding against petitioner's contentions, and that no reason exists for this Court to reexamine its holding in that case.

Petitioner attempts to distinguish the *Seaboard* case on the ground that there:

> "This court held that the power of eminent domain is granted to the new company as a federally conferred power under Section 5(11) of the Interstate Commerce Act." (Petition for Writ of Certiorari, p. 10)

In that case, however, there was nothing to suggest that the question of the right to eminent domain in South Carolina was involved. Neither is that question at all significant in this case, and contrary to the implications in the Petition for Writ of Certiorari (p. 8), neither the Commission, District Court, or Court of Appeals attempted "to vest in a foreign railroad corporation the right of eminent domain."

It is true that the *Seaboard* case arose under Section 5 of the Interstate Commerce Act, 49 U. S. C., Sec. 5 rather than under Section 77 of the Bankruptcy Act, 11 U. S. C., Sec. 205. But the power granted the Commission to override state laws which may interfere with efficient and economical railroad operation is the same under Section 77 of the Bankruptcy Act as under Section 5 of the Interstate Commerce Act.

Section 77(b) of the Bankruptcy Act provides that a plan of reorganization "may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation" and may include "the merger or consolidation of the debtor with another corporation or corporations . . ." Under Section 77(f) the corporation "organized for the purpose of carrying out the plan shall have full power and authority to, and shall put into effect and carry out the plan . . . the laws of any State or the decision or order of any State authority to the contrary notwithstanding." This Court's interpretation of Section 5 of the Interstate Commerce Act in the *Seaboard* case (333 U. S. 118, 125-26), is equally applicable to these provisions of Section 77 of the Bankruptcy Act. See *Callaway* v. *Benton*, 336 U. S. 132, 140-41 (1949); *In re Chicago, Rock Island & Pacific Railway Co.*, 168 F. 2nd 587, 590, 594 (7 Cir. 1948) *cert. denied sub. nom. State of Texas* v. *Brown*, 335 U. S. 855 (1948).*

*In the Courts below, petitioner also sought to distinguish the *Seaboard* case on the ground that "The Constitution and laws of the State of South Carolina specifically provided that no South Carolina railroad could be leased or operated by any foreign railroad. The laws of Texas do not so provide" (Texas R. 66). This point seems now to be abandoned probably because the Texas statutes only allow "A railroad whose total mileage in this state does not exceed 30 miles in length" to be leased to a foreign railroad corporation, and then only under many restrictions. Article 6501, Revised Civil Statutes of Texas, 1925.

In *Texas* v. *United States*, 292 U. S. 522 (1934) (cited in the *Seaboard* case at p. 125), this Court upheld an order of the Interstate Commerce Commission which authorized a non-Texas corporation to acquire control of a Texas railroad over objections based on some of the same statutory provisions which Texas relies on in this case. This Court said (292 U. S. at pp. 531-32):

> "The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce . . . Even explicit charter provisions must yield to the paramount regulatory power of the Congress. New York v. United States, 257 U. S. 591, 601 . . . Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.' . . ."

The lower court's opinion in that case clearly exposed the fallacy of petitioner's argument:

> ". . . If Texas can require every railroad company operating within its boundaries to incorporate in Texas and to maintain general offices and yards in Texas, the other states which this system traverses may do likewise. Missouri and Arkansas and Oklahoma and Louisiana may compel it to incorporate in and to maintain general offices and yards in their respective states. A more intolerable burden on commerce among the states scarcely can be imagined." *Texas* v. *United States*, 6 F. Supp. 63, 67 (W. D. Mo., 1934) aff'd. 292 U. S. 522.

The petitioner presents no issue which has not been adequately disposed of in the cases just discussed.

II

THE POWER OF EMINENT DOMAIN IS NOT AN ISSUE IN THIS CASE.

A. Neither the Commission nor the Courts below attempted to confer the power on the reorganized railroad.

Neither the Interstate Commerce Commission nor the Courts below have ever suggested that they were granting the power of eminent domain to the reorganized company. There is nothing in the plan of reorganization purporting to grant that power. Nevertheless, petitioner insists that one of the questions presented to this Court is "Whether Section 77(f) of the Bankruptcy Act delegates to the Interstate Commerce Commission or the District Court . . . the power to vest in a foreign railroad corporation the right of eminent domain . . ." (Petition for Writ of Certiorari, p. 8). Upon this record no such issue exists, nor can there be any possible conflict with the dictum in *California* v. *Central Pacific Railroad Co.,* 127 U. S. 1, 40 (Petition for Writ of Certiorari, p. 10), that "the right of eminent domain can only be exercised by virtue of legislative grant."

B. Texas local law may grant the power to the reorganized company.

In spite of the fact that petitioner maintains that the Commission and the Courts below actually granted the power of eminent domain to the new company, the burden of its brief is "that being deprived of the power of eminent domain in the State of Texas, the merger or consolidation of its subsidiary debtors with the reorganized company would not result in economy of operations or be in the public

interest . . ." (Texas br., p. 21). Apart from the fact that the Commission and the Courts below have found that consolidation will result in economy and be in the public interest, there is an equally fatal flaw in petitioner's argument because it is by no means clear that even under Texas local law the reorganized company will not have the power of eminent domain. Article 6336 of the Revised Civil Statutes of Texas, 1925 (Texas br., p. 30) provides in part:

> "If *any* railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate . . . required for the purposes of its incorporation or the transaction of its business . . . such corporation may acquire such property by condemnation thereof . . ."

In *West* v. *Whitehead,* 238 S. W. 976 (Tex. App. 1922), a railroad corporation "not organized under the general railroad statutes," was permitted to exercise the power of eminent domain. The Texas Court said (238 S. W. at p. 979):

> ". . . The provisions of the general statute are by express terms made to apply to 'any railroad corporation,' and while appellant company was not organized under the general railroad statutes (title 115) it is nevertheless a 'railroad corporation', and nothing else, and we perceive no reason for excluding it from the operation of a statute which precisely describes it in designating the corporations subject to the provisions thereof. The articles providing a method of condemnation in title 115 are not made to apply only to 'any railroad corporation incorporated under the provisions of this title,' but to 'any railroad corporation.' As the Legislature did not see fit to expressly restrict the operation of the pro-

> visions of the general statute to railroad corporations created thereunder, we are without authority to interpolate that restriction into it."

The way is not barred for the Texas Courts to apply a similar line of reasoning to the reorganized railroad company if and when the occasion presents itself. There is no reason to assume at this time that the Texas Courts cannot accommodate their local law to the needs of the national transportation policy which "is as much the policy of [Texas] as if the act had emanated from its own legislature and should be respected accordingly." *Mondou* v. *New York, New Haven and Hartford Railroad Co.*, 223 U. S. 1, 57 (1912).

Until the Texas Courts have an opportunity to rule on this question, there is no occasion for this Court to resolve a supposed conflict between Federal and local law.

III

THE CONSTITUTIONALITY OF THE TRANSFER OF THE RIGHT-OF-WAY TO THE NEW COMPANY IS BEYOND QUESTION.

Pursuant to Section 77(b) of the Bankruptcy Act, the properties of the Texas debtors will be transferred to the new company. Petitioner asserts that insofar as the plan of reorganization authorizes such transfer "it violates Article VI of, and the Fifth and Tenth Amendments to the Constitution of the United States (Brief, p. 26)". The Tenth Amendment, however, as pointed out in *United States* v. *Darby*, 312 U. S. 100 (1941), does not limit the powers otherwise granted to the Federal Government.

In *New York* v. *United States,* 257 U. S. 591 (1922), this Court upheld an order of the Interstate Commerce Commission which required an interstate railroad to charge a rate in intrastate commerce higher than the rate specified in its charter from the State of New York. That State's contention that the order "deprives New York and her people of property without due process of law" was rejected by this Court (257 U. S. at p. 601). Cf. *Norman* v. *Baltimore and Ohio Railroad Company,* 294 U. S. 240, 308 (1935):

> "Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> * * *
>
> "This is so, even if the contract be a charter granted by a state . . .'

Article VI of the Constitution of the United States simply makes it clear that where a conflict exists between Federal law and the local law of Texas, the former must prevail.

Petitioner thus fails to raise any substantial constitutional question.

CONCLUSION

The Interstate Commerce Commission and the Courts below have consistently rejected petitioner's attempt to impose its local law upon a reorganization being accomplished under Section 77 of the Bankruptcy Act. In so doing they complied with the mandate of Section 77(b) and (f) and the decisions of this Court. The question actually presented by the record in this case has already been decided by this Court against the contentions of the peti-

tioner. It is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
WOLFF & BROPHY,
25 Broadway,
New York 4, N. Y.
Of Counsel.

Dated: New York, N. Y.
December 6, 1951.

FILED
DEC 26 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 416

STATE OF TEXAS,

Petitioner

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,

Respondents

REPLY BRIEF OF PETITIONER, STATE OF TEXAS

PRICE DANIEL
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General
Counsel for Petitioner, the State of Texas

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Respondents

REPLY BRIEF OF PETITIONER, STATE OF TEXAS

Petitioner, the State of Texas, submits this brief in reply to the joint brief filed by respondents, Group of Institutional Investors holding 5% Bonds of Missouri Pacific Railroad Company, Bond Holders Protective Committee of Missouri Pacific Railroad Company General Mortgage, and Bankers Trust Company, Successor Trustee, Missouri Pacific Railroad Company Twenty-year 5% Convertible Gold Bonds Indenture, and to the brief filed by respondent, Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company. For the purpose of brevity these briefs will be designated as Group Brief and Trust Company Brief, respectively.

COUNTERPOINT I

The questions presented by petitioner are substantial and important questions of law which have not been decided by this Honorable Court adversely to petitioner or otherwise.

In Group Brief respondents contend that the petition presents no important questions of Federal law (Group Brief, Point I, pp. 2-3), and therefore should not be reviewed by this Court until the courts of Texas have ruled on the questions raised by petitioner (Group Brief, Point III, p. 11-12). On the other hand, in Trust Company Brief respondent contends that the questions presented have been decided by this Court adversely to petitioner's contentions (Trust Company Brief, Point I, pp. 9-11). Manifestly, respondents are not in accord as to their respective contentions and it is difficult to reconcile these statements.

As pointed out in petitioner's original brief (pp. 9-13), the questions presented have never been decided by this Court, having been raised for the first time by petitioner before the Interstate Commerce Commission, the District Court, and the Court of Appeals in the instant case. Although respondents contend that the issues were disposed of in the case of *In re Chicago, Rock Island and Pacific Railroad Company*, 168 F. 2d 587, cert. den. *Texas v. Brown*, 355 U.S. 855, the record before this Court in the certiorari proceedings will clearly disclose that neither of these questions was before it for determination. It is respectfully submitted that the questions raised by petitioner herein are substantial and important questions of law involving the construction and interpretation of provisions of the Constitution of the United States and a

treaty made and entered into by the United States pursuant thereto.

COUNTERPOINT II

If the Plan of Reorganization as construed by the Commission and the Courts below fails to confer the power of eminent domain upon the reorganized railroad in Texas, such failure negatives the findings by the Commission and the Courts below that the Plan would result in economy of operation, or be in the public interest, or an advantage to all the debtors, as a matter of law.

Respondents contend that the power of eminent domain is not an issue in this case (Trust Company Brief, Point II, p. 12), but that if it is an issue, this Court should not review the question until it has been decided by the courts of Texas (Group Brief, Point III, pp. 11-12). All respondents contend that the holding by the Court of Appeals below is not in conflict with the decision in this Court in *Calloway v. Benton*, 336 U.S. 132, which held that the ambit of Federal power under the bankruptcy laws of the United States is not less broad than the power to override State laws granted under the Interstate Commerce Act. Petitioner concedes that such holding is correct, but contends that in the same case this Court held that the power under the Bankruptcy Act flows from a different source than the power granted under the Interstate Commerce Act.

Section 5(11) of the Interstate Commerce Act grants to merged or consolidated railroads federally conferred powers (*Seaboard Air Line Railroad Company v. Daniel*, 333 U.S. 118, 126), while Section 77(f) of the Bankruptcy Act fails to specifically delegate or

confer such federal powers to the reorganized railroad. All of the respondents correctly contend that the *Seaboard* case, in interpreting Section 5(11) of the Interstate Commerce Act, fails to mention specifically the words "eminent domain." (Group Brief, p. 11; Trust Company Brief, p. 12). Counsel would seem obtuse in their construction of this Court's opinion in the *Seaboard* case if they fail to concede that the power to exercise eminent domain in States other than the domiciliary State of the corporation was not a federally conferred power under the decision of this Court in *California v. Central Pacific R. Co.*, 127 U.S. 1, 40, cited by this Court in the *Seaboard* case as an authority for the delegation of federal powers under Section 5(11) of the Interstate Commerce Act.

Respondent Trust Company contends that under the laws of Texas the power of eminent domain is granted to the reorganized company (Trust Company Brief, Point II (B), pp. 12-14).

The answer to respondent's contention that the reorganized company would be vested with the right of eminent domain under the laws of Texas presently in effect has been discussed in petitioner's brief at pages 1 to 21, inclusive, but in its Brief (pp. 13-14) respondent Trust Company asserts that the case of *West v. Whitehead*, 238 S.W. 976, supports its contention that the Texas courts would so construe the present laws as to include the reorganized foreign corporation. The cited case fails to support respondent's contention. The Court's holding is that the right of eminent domain under the authority granted to common carrier railroads engaged in intrastate commerce (Art. 6316a, Pet. Brief, p. 29) may be exercised by a corporation formed under the general corporation laws to operate

a mining railroad, *provided that the mining railroad corporation declare itself to be a "public highway and common carrier," thus placing itself under the control of the Railroad Commission of Texas. (West v. Whitehead, supra,* p. 976). Admittedly, the reorganized corporation will not be incorporated under the laws of the State of Texas and will not place itself under the jurisdiction of the Railroad Commission of Texas since it cannot be granted a permit to do business in Texas as a foreign railroad corporation and is not subject to the laws of Texas under the provisions of Section 77(f) of the Bankruptcy Act.

The contention of the Group is that petitioner has been unable to show that the Texas courts have held or will hold that the reorganized corporation would be deprived of the right of eminent domain in Texas since the cases cited by petitioner did not involve any Federal question. Therefore, since the courts of Texas have not ruled upon the issue, this Court should not review the question presented. (Group Brief, Point III, pp. 11-12). The further contention is made that even if the reorganized company were deprived of this right, petitioner has failed to show that the Plan would be rendered impracticable thereby or that the operations of the reorganized company would be adversely affected. (Group Brief, Point I(A), pp. 8-9). The fallacy of these contentions is that, unless otherwise decided by this Court, it is presumed that the courts of Texas will enforce the clear and unambiguous statutory provisions in accord with legislative intent in their enactment.

As an example that the reorganized company would not be adversely affected, respondents cite, *dehors* the record, the operation in Texas of the Chicago, Rock

Island & Pacific Railway Company, a Delaware corporation, and the Kansas City Southern Railway Company, a Missouri corporation. Petitioner requests the indulgence of the Court in submitting, also *dehors* the record, certain facts in this connection which the Court is requested to consider.

The Chicago, Rock Island & Gulf Railway Company, the wholly owned Texas subsidiary of Chicago, Rock Island & Pacific Railway Company, still maintains its charter as a Texas corporation and pays taxes to the State of Texas in accordance with the laws thereof, although the dissolution of such corporation was ordered by the plan of reorganization effective January 1, 1948. The Texarkana & Fort Smith Railway Company, the wholly owned Texas subsidiary of the Kansas City Southern Railway Company, was merged with the latter pursuant to Section 5 of the Interstate Commerce Act, and the injunctive proceedings instituted by the State of Texas in the State courts of Texas, and the Kansas City Southern Railway Company in the United States District Court of Texas (*Kansas City Southern Railway Company v. Daniel*, 180 F. 2d 910), were dismissed by agreement of the Attorney General of Texas and counsel for the railway company, subject to the holding of this Court in the instant case, in order to avoid a multiplicity of suits.

Petitioner submits that the question presented should be decided by this Court.

COUNTERPOINT III

The transfer of the easements for rights-of-way in Texas to the reorganized company would violate the terms of the treaty made under the authority of

the United States with the Republic of Texas, which is the supreme Law of the Land.

The Group respondents contend that the Plan of Reorganization may order the transfer of the easements for rights-of-way of the debtor companies to the reorganized company regardless of contrary state laws (Group Brief, Point I(a), pp. 3-8), and that since petitioner has not shown that the courts of Texas have held that upon merger with a foreign corporation under such a plan, the easements for rights-of-way of the Texas debtors will revert to the State or to former owners, this Court should not consider the question unless and until it is decided by the courts of Texas. (Group Brief, p. 12.) On the other hand, respondent Trust Company contends that the constitutionality of the transfer of the rights-of-way to the new company is beyond question and thus no substantial constitutional question is raised. (Trust Company Brief, Point III, pp. 14-15.) All respondents' contentions are based on two premises: first, that under Article VI of the Constitution of the United States, where a conflict exists between federal law and the state law of Texas, the former must prevail, and second, that under the provisions of Section 77(f) of the Bankruptcy Act the Plan shall be carried into effect, the laws of any State to the contrary notwithstanding.

Petitioner's answer to these contentions has been fully discussed in petitioner's brief at pages 11-13; 21-26, and therefore is not restated here. It is contended that the rights claimed by petitioner are not based solely upon state law but are derived from the terms of the Treaty of Annexation entered into between two sovereign nations, the United States of America and the Republic of Texas, which, in the

language of Article VI of the Constitution of the United States, constitutes the "supreme Law of the Land."

In *United States v. Lee Yen Tai,* 185 U.S. 213, 221 (1902), this Court held as follows:

> ". . . Again, in *Whitney v. Robertson,* 124 U.S. 190, 194: 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.' See also *Taylor v. Morton,* 2 Curtis, 454, 459; *Clinton Bridge Case,* 1 Woolworth, 155; *Ropes v. Church,* 8 Blatchf. 304; 2 Story on Const., § 1838. Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but *must appear clearly and distinctly from the words used in the statute* or in the treaty." (Italics supplied)

In *Cook v. United States,* 288 U.S. 102, 120, (1932) this Court held that:

> ". . . A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. . . ."

Since the Congress, in enacting Section 77 of the Bankruptcy Act did not expressly declare its purpose

to supersede the terms of the Treaty of Annexation entered into between the Republic of Texas and the United States of America whereby Texas reserved the title to all of its public lands, the terms of the Treaty should not now be abrogated or modified.

Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General

Counsel for Petitioner, the State of Texas.